

ORIGINAL

Supreme Court, U.S.
FILED
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No. 90-6297

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RESPONSE REQUESTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JOSEPH WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

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QUESTION PRESENTED

Whether the court of appeals erred in upholding the district court's three-month upward departure from the Sentencing Guidelines, where it found some of the reasons given by the district court impermissible but concluded that other reasons were sufficient to justify the departure.

(I)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-13a) is reported at 910 F.2d 1574.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1990. The petition for a writ of certiorari was filed on November 21, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Wisconsin, petitioner was convicted on one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 27 months' imprisonment, to be followed by three years' supervised release.

The court of appeals affirmed (Pet. App. 2a-13a).

1. Petitioner's sentence under the Sentencing Guidelines was calculated as falling within the range of 18 to 24 months' imprisonment, based on an offense level of 9 and a criminal history category of V. Having determined that the criminal history category did not adequately reflect the seriousness of petitioner's past criminal conduct, the court used the next higher criminal history category and sentenced petitioner to 27 months' imprisonment--an upward departure of 3 months.

2. In examining the correctness of the district court's decision to depart upward, the court of appeals found that the court's reliance on two previous convictions more than 15 years old was appropriate under § 4A1.3 of the Guidelines, which allows consideration of old convictions as "'reliable information' indicating more extensive criminal conduct than otherwise reflected by the criminal history category." Pet. App. 8a. The court of appeals also found that a second basis for the court's departure--conduct of petitioner that resulted in arrests but not convictions--was invalid because the court did not articulate accurate and reliable information, apart from the arrest record, that justified departure on that basis. Pet. App. 9a-10a.

The court of appeals nevertheless upheld the sentence, finding an adequate basis for the three-month departure in the valid factors relied on by the district court. These included not only the two convictions more than 15 years old, but also a previous conviction for the same offense as well as threats that petitioner

had made on the lives of DEA agents and their families. The court held that all of these factors provided ample evidence for the court's finding that the criminal history category did not adequately reflect petitioner's past criminal conduct, and therefore justified the "rather modest increase in sentence." Pet. App. 11a.

ARGUMENT

Petitioner claims (Pet. 5-8) that the court of appeals erred in failing to vacate a sentence that departed upward from the Guidelines, where the district court relied on both permissible and impermissible factors for the departure. He argues that the decision below conflicts with Ninth and Tenth Circuit cases in which the courts of appeals remanded for resentencing where both proper and improper factors were used to justify upward departures from the Guidelines range.

In fact, however, the different outcomes in the instant case and those cited by petitioner do not indicate any conflict in the legal interpretation of the Guidelines; rather, they reflect merely a difference in the extent to which the reviewing court in each case was able to determine whether the departure was justified by a legally permissible factor.

In United States v. Hernandez-Vasquez, 884 F.2d 1314 (9th Cir. 1989), the district court departed upward from the applicable Guideline range by eight months, based on three different factors. The court of appeals found that two of the three grounds for departure were improper, and that the third and proper factor could

justify an enhancement of no more than three months. The court directed that the district court amend its sentence accordingly. *Id.* at 1316.^{1/}

In *United States v. Zamarripa*, 905 F.2d 338 (10th Cir. 1990), the district court imposed a sentence of fifteen months; the court stated that it was departing from the Guidelines, which appeared to contemplate a range of two to eight months, but it did not specify what it considered the applicable Guideline range. *Id.* at 339. The court of appeals found that two of the factors relied on by the district court were not proper bases for departure, but found that the third stated ground for departure might be proper. *Id.* at 340-341. However, in light of the district court's failure to state with specificity the precise Guideline range from which it was departing, in combination with the errors made by the district court in relying on invalid factors, the court of appeals concluded that it could not ascertain whether the sentence imposed was a reasonable departure or not. Accordingly, it remanded for resentencing. *Id.* at 340-342.

In contrast with these decisions, the court of appeals in this case was able to determine that the district court's departure of three months was based on proper grounds and was appropriate on

¹ In another Ninth Circuit decision, *United States v. Nuno-Para*, 877 F.2d 1409 (1989), on which the *Hernandez-Vasquez* court relied, the court of appeals also remanded for resentencing. But again, the court there found that the reasons primarily relied upon by the district court in making its departure decision were not proper bases for departure. The court found it impossible to tell whether the sentence imposed was justified by any permissible factors. 877 F.2d at 1414.

those grounds. As the court of appeals observed, the district court conducted a "searching inquiry" into the entirety of petitioner's past criminal conduct, and it identified several factors that warranted an increase in petitioner's criminal history category. Particularly in light of the modest departure of only three months, the court reasonably concluded that the grounds for departure in this case were so clear as to obviate the need for a remand for resentencing.^{2/}

This Court has already denied review in a similar case in which it was also claimed that the court of appeals should have remanded for resentencing because the court relied both on permissible and impermissible factors for an upward departure from the Guidelines range. Just as in this case, the court in *United States v. Christoph*, 904 F.2d 1036 (6th Cir. 1990), cert. denied, No. 90-5535 (January 7, 1991), was able to determine, based on the degree to which the defendant's criminal history score failed to take into account his history of criminal activity, that an upward departure of 19 months was justified on that valid basis alone, without regard to the additional factors on which the district court should not have relied. 904 F.2d at 1041-1042. Like

² Another case decided by the Seventh Circuit, and on which the court in this case relied, *United States v. Franklin*, 902 F.2d 501 (1990), involved a departure based on two permissible factors and one improper one. The court discussed the reasonableness of upholding a departure without remanding for resentencing as long as the reviewing court could determine that the permissible grounds would justify the full length of the departure made. And in that case, too, the court was able to say with confidence that the permissible grounds for departure provided an ample basis for the entire amount of the departure selected by the district court. 902 F.2d at 507-509.

Christoph, the instant case is not in conflict with other cases with regard to the legal principles governing upward departures from the Guidelines. Rather, the courts have made case-by-case determinations, based on the facts presented in each case, of the appropriate disposition under the broad authority granted them by 28 U.S.C. 2106.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

KATHLEEN A. FELTON
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FEBRUARY 1991

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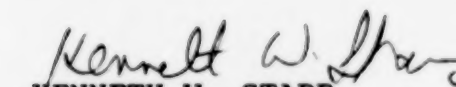
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NO. 90-6297

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the BRIEF FOR THE UNITED STATES IN OPPOSITION by mail on February 21, 1991.

KENNETH H. HANSON
135 SOUTH LASALLE STREET
SUITE 1940
CHICAGO, IL 60603


KENNETH W. STARR
Solicitor General

February 21, 1991

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Joseph N. Williams)
v.)
United States of America)

ORIGINAL

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Joseph N. Williams by his attorney moves for leave to proceed in Forma Pauperis. In support of the motion counsel states that Kenneth H. Hanson was appointed by the United States Court of Appeals for the 7th Circuit under the Criminal Justice Act 18 USC Sec. 300A(d)(6).

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Kenneth H. Hanson

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CERTIFICATE OF SERVICE

Kenneth H. Hanson, a member of the bar of this court hereby certifies that on November 20, 1990 he mailed one copy of the petition for writ of certiorari and one copy of the motion for leave to proceed in form pauperis to the Solicitor General, Department of Justice, Washington, D.C. 20530 and an additional copy of each of those documents was mailed to United States Attorney Daniel P. Bach, Western District of Wisconsin, 120 N. Henry Street, Room 420, Madison Wisconsin, 537031 on November 20, 1990. Mailing was accomplished before 5:00 p.m. at the Loop Post office, Clark and Adams Streets, Chicago, Illinois on November , 1990 first class postage was pre-paid.

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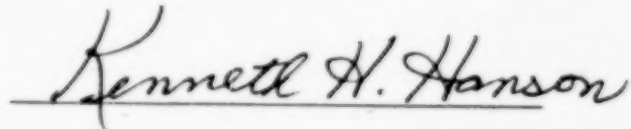
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CERTIFICATE OF FILING BY MAIL

Kenneth H. Hanson, a member of the bar of this court hereby certifies under penalty of perjury that he mailed 12 copies of the petition for writ of certiorari and one copy of the motion for leave to proceed in form pauperis to the Clerk of the United States Supreme Court, Supreme Court Building, Washington, D.C. 20543. Mailing was accomplished at the Loop Post office, Clark and Adams Streets, Chicago, Illinois on November 20, 1990 before 5:00 p.m. first class postage was pre-paid.


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